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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-21

ERNEST V. HORVATH and GEORGE A. HORVATH,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MANES, STURIM, ROTH & FISHER,
Attorneys for Petitioners, Ernest V. Horvath and George A. Horvath,
250 Park Avenue,
New York, New York 10017.
(212) 687-0900

DAVID FISHER,
PAUL A. DOUGLAS,
of Counsel.

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IN THE

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OCTOBER TERM, 1971

No. .....

ERNEST V. HORVATH and GEORGE A. HORVATH,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on April 2, 1971.

Opinions Below

The opinion of the District Court, which is not reported, is reprinted in the Appendix (App. pp. A1-A5).*

The opinion of the Court of Appeals, not yet officially reported, is reprinted in the Appendix (App. pp. A6-A11).

* Unless otherwise indicated, references are as follows: "App.", to the Appendix of this Petition; "a" to the Appendix in the Court of Appeals.

Jurisdiction

The United States Court of Appeals for the Second Circuit affirmed a decision of the United States District Court for the Southern District of New York denying the motion of Ernest V. Horvath and George A. Horvath, petitioners herein, pursuant to Rule 60(b), Federal Rules of Civil Procedure, to vacate a default judgment entered against them for over $3,000,000. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Whether the Court of Appeals correctly held, as a matter of law, that Rule 60(b)(6) and 60(b)(1) were mutually exclusive and that Rule 60(b)(6) cannot be considered under the facts of the case at bar.

2. Did the District Court abuse its discretion in denying petitioners' motion to vacate the default judgment under Rule 60(b)(1) of the Federal Rules of Civil Procedure, where such a $3,000,000 judgment:

(a) Resulted because of the petitioners' attorneys' fault, mistake, inadvertence, error, excusable neglect or gross negligence, and without the petitioners' knowledge or participation therein, and no intervening events have occurred since entry of judgment which would make vacating of the judgment prejudicial to the respondent;

(b) Was obtained notwithstanding the fact that petitioners have valid and meritorious defenses to respondent's claim and have at all times asserted them;

(c) Was obtained and has been sustained notwithstanding the fact that respondent, although claiming to be ready for trial when it obtained its default judgment, has

set forth no facts whatsoever to support its claim against petitioners in any amount;

(d) Was obtained without the petitioners' knowledge that a default judgment was being entered or that the case had come up for disposition;

(e) May result in the petitioners having a lifetime burden since they have not yet beeen discharged in their bankruptcy proceedings where there are now pending objections to discharge;

(f) Is the basis of an attack by the government against a transfer made more than five years earlier by one of the petitioners to his wife of their home and the furnishings therein, at a time when the transferor was solvent;

(g) Was obtained by the government after the petitioners had filed a Petition in Bankruptcy and had been adjudicated bankrupts;

(h) Was obtained after the government had filed a proof of claim in the bankruptcy proceeding thereby electing to proceed and prove its claim in such proceeding;

(i) Was obtained after a trustee in bankruptcy had been appointed and had qualified and without said trustee having intervened in said litigation or being made a party thereto.

3. Whether in the situation set forth under Question 2 of the Questions Presented, the District Court abused its discretion in denying petitioners' motion to vacate the default judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Statutory Provisions Involved

The pertinent parts of Rule 60 (b) (1) and Rule 60 (b) (6) of the Federal Rules of Civil Procedure (28 U. S. C.) provide as follows:

> "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> "(1) Mistake, inadvertence, surprise, or excusable neglect; . . . .
>
> . . . .
>
> "(6) any other reason justifying relief from the operation of the judgment."

Section 15 of the Stock Corporation Law of New York as it read at the relevant time is lengthy and is set forth in the Appendix (App. pp. A14-A15).

Section 273a of the Debtor and Creditor Law of the State of New York is set forth in the Appendix (App. p. A15).

Statement of the Case

The original basis for this case was the entry of judgment by respondent against Horvath Mills, Inc. (hereinafter referred to as "Horvath Mills"), on March 11, 1958. The complaint in the earlier action was based upon an undefended Renegotiation Board decision with respect to government contracts of Horvath Mills of the early 1950's (17a).

Almost six (6) years later, on January 8, 1964, respondent filed the complaint in the within action alleging that

the petitioners were liable on the judgment obtained against Horvath Mills for having allegedly transferred, in their capacity as officers and directors, certain assets of Horvath Mills to Massachusetts Mohair Plush Company, Inc. (hereinafter referred to as "Masmo") in alleged violation of New York Stock Corporation Law Section 15 (17a).

By order of the District Court, entered on April 26, 1966, respondent was granted leave to amend its complaint by adding Masmo as a party defendant (17a).

On September 22, 1966, respondent's action was dismissed for failure to prosecute (Document 40) but the action was later restored (Document 41).

On April 28, 1970, respondent, without the consent of petitioners or their counsel, entered a default judgment (79a-80a) against all the party defendants including petitioners.

On June 12, 1970, a motion was made by petitioners' then counsel pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to vacate said judgment. Judge Tyler denied that motion on July 28, 1970 and the Court of Appeal affirmed that decision on April 2, 1971.

Judge Tyler's decision held that petitioners' arguments centered under Rule 60(b)(1) and there was no factual or legal reason for consideration of Rule 60(b)(6). The Court of Appeals seemingly held that petitioners' motion involved mistake and that this ground is only applicable under Rule 60(b)(1) and thus Rule 60(b)(6) is not applicable.

(1) The Default Judgment Was Obtained by Reason of the Mistake, Inadvertence, Error or Neglect (Excusable or Gross) of Horvaths' Then Counsel

That the faults were counsel's, not petitioners', is admitted by such counsel who, in affidavits, totally exculpate petitioners. These faults consist of:

(a) Counsel's mistaken belief that filing of a bankruptcy petition automatically stayed the within action;

(b) failure of inter-office communication among the attorneys in counsel's office; and

(c) their failure to consider the consequences of the default judgment.

The depth of counsel's responsibility is such that they were obliged to state in an affidavit that:

> "The admission of error, albeit inadvertent, is inherently repugnant to one's sense of professional pride. Under the circumstances, your deponent, his partners and his associates must forego pride for truth" (91a).

Counsel's own affidavits, viz., that of Albert M. Kaufman and Ronald S. Itzler, clearly reflect this responsibility.

Mr. Kaufman stated that Frederick E. M. Ballon, the senior partner in the law firm representing petitioners, informed him that "since petitions in bankruptcy had already been filed, a judgment against them would be ineffectual and *could not be entered*" (emphasis added) (27a). Mr. Kaufman further stated that, although Messrs. Ballon and Itzler do, he does not practice in the bankruptcy field and "was not aware that a motion had to be made in the Bankruptcy Court in order to stay the entry of any judgment against the defendants, and assumed that same was automatically stayed" (28a).

Mr. Itzler, a partner in said law firm, with considerable bankruptcy experience, stated in his affidavit that "for some inexplicable reason, the pendency of the within matter at said time did not come to" his attention and "as a result thereof, this matter was not reflected in the bankrupt's schedules and statement of affairs" (30a-31a).

In explanation, he stated:

> "Firstly, on March 2, 1970 (prior to the entry of the judgment herein), Seymour J. Shyman, a senior member of your deponent's law firm, and one of the men in charge of the defense of the within action, withdrew from the firm, without any notice, and caused an unexpected transference of responsibility in this matter. Albert M. Kaufman, Esq., an associate in your deponent's law firm, who was working with Mr. Shyman on the day-to-day routine in this matter, was placed in a position of full charge and his unfamiliarity with the provisions of the Bankruptcy Act prevented him from making a proper decision with reference to this action and the necessity for moving for a stay in this Court. In addition, there was an unfortunate lack of communication between Mr. Kaufman, the bankrupts and your deponent with regard to the pendency of this suit and the possibility of the entry of judgment. To add to the adverse chain of events, Mr. Kaufman was constrained to enter a hospital during the month of March for major surgery. His absence from the office added to the already existing confusion with regard to the status of this matter which, unfortunately, eventually resulted in the entry of the default judgment herein (34a-35a).

Mr. Itzler, in his reply affidavit, states that his firm never considered the proposition as to whether the action

was dischargeable (93a), and that "the entry of the default judgment herein occurred by virtue of the inadvertencies of [his] office, a lack of communication among the members and associates thereof and was never a result of a conscious and deliberate plan" (94a).

(2) Petitioners Had No Knowledge of Their Counsel's Errors Nor of the Proposed Default Judgment

Irrespective of the nature of the exact errors or negligence of petitioners' counsel, neither of the petitioners knew, nor could have known that

(a) the Government was not stayed from continuing the action (15a, 22a-23a);

(b) the Government was planning to obtain a default judgment (15a, 22a-23a);

(c) their counsel was taking no action to oppose a default judgment (15a, 22a-23a).

In fact both petitioners were informed by their counsel and believed that the action had been automatically stayed (15a) (24a).

(3) A Default Judgment Would Be an Economic Catastrophe for the Horvaths

There are many severe consequences that may result from the entry of this judgment.

(a) If the three million dollar judgment is not discharged in bankruptcy, the petitioners will each be saddled with a liability which will be impossible to pay in their lifetime. Objections to discharge of each of the petitioners are presently pending in their bankruptcy proceedings. A lifetime liability of $3,000,000 without interest is an unconscionable penalty for failure to obtain such discharge.

(b) The bankrupt estate will (if the judgment is treated as *res judicata* by the Referee) be burdened with a three million dollar claim of the respondent and all other creditors will be prejudiced in the sharing of assets, if any, in the bankruptcy proceedings.

(c) Transactions by the petitioners, at a time when they were solvent, made and entered in good faith, will be subject to attack by virtue of the judgment obtained herein. The action of respondent in the examination under Section 21a of the Bankruptcy Act, conducted since the entry of said judgment, has been directed against innocent third persons. Thus, the Trustee in Bankruptcy of Ernest V. Horvath's Estate is seeking to obtain the home, furnishings and other property owned by Ernest's wife on the ground that transfers made over five years ago when the transferor was clearly solvent, are subject to attack under a unique New York statute, namely, Section 273-a of the Debtor and Creditor Law. This statute provides that every conveyance made without fair consideration at a time when the transferor is a defendant in an action is fraudulent as to the plaintiff in that action without regard to actual intent if, after final judgment for the plaintiff, the transferor-defendant fails to satisfy the judgment. Whether or not the Trustee is correct, it is clear that, absent the default judgment, the statute upon which the Trustee is proceeding would be inapplicable and have no force and effect (16a).

(4) Petitioners Diligently Defended This Action

The petitioners diligently and actively defended this action. Answers to voluminous interrogatories were prepared and lengthy depositions were taken on numerous occasions. From 1964 to 1970, the first and only occasion

when counsel for the Horvaths was not diligent in defending this action was when it permitted the default referred to herein (36a). The one patent instance of lack of diligence in the action was on the part of respondent, not petitioners, since respondent's action was dismissed for lack of prosecution and later restored—a privilege denied to petitioners.

(5) Petitioners' Meritorious Defenses

The default judgment against petitioners is based on a claim against a corporation on matters arising twenty years ago; a default judgment against such corporation taken twelve years ago; and an action commenced by respondent six years ago and dilatorily prosecuted down to the date of the default which Judge Tyler refused to vacate.

In February, 1958, the United States commenced an action against Horvath Mills (a company then controlled by petitioners) based on renegotiations of contracts awarded in 1950 and completed prior to 1954. Default judgment against Horvath Mills was entered in 1958. The instant action was instituted by respondent on January 8, 1964 on the alleged basis that certain assets of Horvath Mills were transferred by petitioners to the defendant Masmo in their capacity as officers and directors in violation of New York Stock Corporation Law Section 15.*

Petitioners deny the violation and assert ten defenses. Respondent, by its failure to deal with or deny any of defendants' statements with respect to its defenses in the District Court and by its continued silence before the Court of Appeals has, for the purposes herein, accepted defendants' allegations as true. These defenses (any one of which is sufficient fully to defeat respondent's claim) are:

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* For the text of the law as it then read, see App. pp. A14-15.

1. No obligation was due to respondent from Horvath Mills at the time of the alleged transfers (20a).

2. There were no actual transfers from Horvath Mills to Masmo; the alleged transfers were actually merely the reversal of bookkeeping entries that had been improperly made in the first instance (21a).

3. Horvath Mills was not insolvent, nor was such insolvency imminent at the time of the alleged transfers (21a).

4. None of the alleged transfers was preferential (21a).

5. No intent to give a preference existed (21a).

6. Defendant, Masmo, did not have reasonable cause to believe that a preference would be effected (21a).

7. The entire question of plaintiff's damages, if any, is in issue (21a).

8. The Statute of Limitations (Section 214, subdivision 2, New York Civil Practice Law and Rules) bars the plaintiff, since the acts complained of occurred more than three years prior to commencement of this action (21a).

9. Plaintiff has been guilty of gross laches, and equity should bar the plaintiff from maintaining this action (21a).

10. There were no transfers which were not based on new consideration (22a).

These defenses have not been submitted to the Court for determination nor, for that matter, has the Government's case been subject to proof or consideration of its validity. Inasmuch as the Government has not raised here-

in factual issues respecting these defenses, this petition omits review of the underlying facts relating to the alleged transfers which are fully set forth in the Record (18a-19a).

Reasons for Granting the Writ

Certiorari should be granted because:

(1) There is a split among the Circuit Courts of Appeals (recognized by the Second Circuit in its opinion (App. at p. A11) as to whether Rule 60 (b) (1) and 60 (b) (6) are mutually exclusive. The Second Circuit held that since the grounds for relief under Rule 60 (b) only concerned mistake, Rule 60 (b) (1) was the only section applicable, and the Second Circuit failed to consider Rule 60 (b) (6). The Supreme Court has never directly considered this question and in view of the split, this Court should give direction to the Circuits. The case at bar is not one where the one year limitation under Rule 60 (b) (1) has expired. Thus the petitioners are not seeking to use Rule 60 (b) (6) as a back door to avoid the one year limitation. Petitioners' motion to vacate the judgment was brought within forty days after the entry of judgment.

(2) Both the District Court and the Court of Appeals specifically stated that only Rule 60 (b) (1) was applicable and neither therefore considered Rule 60 (b) (6). This failure was not only an abuse of discretion but an error of law. If such a determination is left standing Rule 60 (b) (6) which had been designed to permit vacating of judgments where justice so demanded for "any other reason" would be completely emasculated. The Supreme Court should make a determination as to the broad scope of Rule 60 (b) (6) so that said Rule will not be a "dead letter" but would serve the equitable function for which it was designed.

(3) Whether or not Rule 60 (b) (1) and 60 (b) (6) are considered mutually exclusive in some aspects, the negligence of petitioners' prior counsel can only be described as gross and under the law such gross negligence is grounds not covered by Rule 60 (b) (1) but rather by Rule 60 (b) (6).

(4) The injustice of permitting a three million dollar default judgment against two individuals to remain without opportunity to have the matter tried on its merits (particularly where no merits for the claim are shown) should not be permitted under Rule 60 (b) where even under the most unfavorable inferences to be drawn from the record, it is uncontroverted that the petitioners not only never consented to said judgment but never knew that such a judgment was even proposed.

(5) This Court should set limits upon a client's responsibility for his attorney's culpability which results in and is the sole cause of a multi-million dollar default judgment being entered.

(6) The denial of petitioners' motion to vacate the default judgment pursuant to Rule 60 (b) (1) and 60 (b) (6) of the Federal Rules of Civil Procedure was an abuse of discretion.

(7) The failure by the Court of Appeals to consider any ground under Rule 60 (b) (1) other than mistake was an error in law.

Set forth below is a summary of the law applicable to the facts herein with respect to Rule 60 (b) (6) (Point I) and Rule 60 (b) (1) (Point II).

POINT I

The uncontroverted facts set forth below by petitioners were sufficient to require the District Court (1) to consider Rule 60(b)(6) of the Federal Rules of Civil Procedure and (2) to grant petitioners' motion to vacate the default judgment.

Rule 60 (b) (6) is "a residual clause to cover unforeseen contingencies; intended to be a means for accomplishing justice in, what may be termed generally, exceptional situations". 7 *Moore's Federal Practice* 301 (2d Ed. 1970).

Even if we were to accept the narrowest construction of Rule 60 (b) (1) and impute counsel's error or negligence to the client, each set of circumstances in any case should be separately considered and where, as in this case, the cumulative effect is to create undue hardship upon petitioners, without proof of right on the part of respondent, the quantitative effect is a classic instance of qualitative change, requiring the intervention of equitable considerations to accomplish justice.

In our case we have:

A. Clearly admitted error and negligence of counsel, without client's fault;

B. A potential lifetime burden of enormous amounts;

C. Possible loss of home by a wife for a transfer made when solvent and without intent to defraud by the application of Section 273-a of the Debtor and Creditor Law of New York;

D. Diligence by petitioners in prosecution of their defense;

E. Valid and meritorious defenses;

F. No proof of validity of right to judgment;

G. No prejudice to respondent in opening the default, and at most there would be an additional minimal accounting cost to be weighed against a three million dollar judgment;

H. Disregard by respondent, in entering a default judgment, of pending bankruptcy proceedings respecting which it had notice;

I. Failure to make the trustee party to the action;

J. The Trustee's own conflict of interest and inconsistency of position in taking advantage of the judgment for use in seizing the wife's property as opposed to his obligation to resist the claim on which the judgment is founded in the bankruptcy proceeding in order to protect other creditors;

K. The anomaly of permitting a judgment to stand against petitioners, while the claim on which it is allegedly based may be denied as a creditor claim in the bankruptcy proceedings;

L. No trial on the merits;

M. The Government being a party to a default judgment against its citizens where no proof whatsoever has been offered to support its claim.

Under the foregoing circumstances, the over-all equitable purpose of Rule 60 (b) (6) should be considered applicable. This Court and other courts have so held.

Thus, this Court in *Klapprott* v. *United States*, 335 U. S. 601, 614, 615 has said, regarding Rule 60 (b) (6):

> "In simple English, the language of the 'other reason' clause, for all reason except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

The Courts below have wholly failed to consider Rule 60 (b) (6) as their opinions make perfectly clear (App. pp. A5, A11).

Other Circuit Courts of Appeals have recognized the applicability of Rule 60 (b) (6).

In *Patapoff* v. *Vollstedt's, Inc.*, 267 F. 2d 863 (9th Cir. 1959) the Court found that the appellant had made a showing that she had waived a valid defense because she had been misled by the erroneous action of her attorney. The Court stated:

> "We need not here be concerned with whether the mistake under which appellant acted was a mistake of law, induced by the erroneous advice given her by the attorney. If we assume, that the 'mistake, inadvertence, surprise, or excusable neglect, listed in subdivision (1) of Rule 60(b) does not ordinarily apply where the mistake, inadvertence, etc., relates to a mistake of law, yet subdivision (6) provides that relief can be granted for 'any other reason justifying relief from the operation of the judgment.'" See also *Kinnear Corp.* v. *Crawford Door Sales Co.*, 49 F. R. D. 3 (S. C. 1970); *U. S.* v. *96 Cases, More or Less, of Fireworks*, 244 F. Supp. 272 (N. D. Ohio 1965).

The negligence of petitioners' prior counsel is clear—the question raised below is whether it was excusable. If not excusable, it clearly was gross negligence since it is undisputed that counsel permitted a three million dollar default judgment to be entered against petitioners without notifying them of the proposed judgment or of its entry. It has been held that where gross negligence of counsel is involved without negligence on the part of the client, Rule 60 (b) (6) justifies the vacating of a default judgment even where Rule 60 (b) (1) would not be applicable because the neglect was not excusable. *King* v. *Mordowanec*, 46 F. R. D. 474 (R. I. 1969); *L. P. Steuart, Inc.* v. *Matthews*, 329 F. 2d 234 (D. C. Cir. 1964), *cert. den.* 379 U. S. 824.

The United States District Court for the Eastern District of New York approved the utilization of Rule 60 (b) (6) to accomplish substantial justice in the *Matter of Balter*, 151 F. Supp. 278 (E. D. N. Y. 1957). In that case, plaintiff's counsel likewise failed to obtain a stay of the proceeding after petitions in bankruptcy had been filed against the defendant and he was adjudicated a bankrupt.

> "It would have been appropriate for the bankrupt's attorney to have procured a stay as is contemplated by Section 11 of the Bankruptcy Act, 11 U. S. C. A. Section 29, as against the judgment creditor, but no such application was made."

A creditor thereafter obtained a default judgment in a pending action and garnished the bankrupt's salary. The Referee stayed the judgment creditor from demanding or collecting any deductions made from the bankrupt's salary until the question of the bankrupt's discharge had been adjudicated. The moneys were to be held until after a discharge had been ruled upon; if granted the moneys would be turned over to the bankrupt, and only if denied,

to the judgment creditor. The bankrupt was granted all of the relief required in order to put the parties in the position they would have been in had a motion for a stay been made prior to the entry of the default judgment. It was not necessary to relieve the bankrupt defendant from the burden of moneys being turned over to the garnishing creditor. In the instant matter, the vacating of the judgment is absolutely necessary in order to do substantial justice. It is indeed only by virtue of the default judgment that the Trustee has been enabled to move pursuant to Section 273-a of the Debtor and Creditor Law of the State of New York. All the petitioners herein ask is that the parties be put in the position they would have been had a motion to stay the continuation of this lawsuit been made prior to the entry of the default judgment herein.

Otherwise the Trustee, by use of said Section 273a will have the drastic remedy of being able to seize a third party's home by virtue of a default judgment which said innocent party may not be able to contest. Obviously, if the Trustee is permitted to exercise this extraordinary penal remedy (resulting through counsel's actions) this may in fact deprive said innocent party of property without due process of law and a determination on the merits of the action should first be made.

This should be required especially where such a large sum as $3,000,000 is involved. A number of cases have recognized that "matters involving large sums should not be determined by default judgments if it can reasonably be avoided". *Tozer* v. *Charles A. Krause Milling Co.*, 189 F. 2d 242, 245 (3d Cir. 1951).

If the Bankruptcy Court should accept as *res judicata* a default judgment which was obtained after a petition in bankruptcy was filed and hold that such judgment could

stand as a claim without further proof (a position which petitioners believe is incorrect) it would in effect, be permitting an alleged creditor of the bankrupt an opportunity to defraud other creditors by obtaining a default judgment and then sharing in the bankrupt's estate without establishing its claim. Although in the case at bar, there is no collusion between the bankrupts and the creditor who obtained the default judgment, the permitting of such a default judgment would encourage such collusion.

Rule 60 (b) (6) should be applied to default judgments which are obtained after the petition in bankruptcy has been filed and the trustee in bankruptcy has not been substituted as a party or appeared therein.

Rule 60 (b) (6) was applied in an analogous situation in *Marquette Corp.* v. *Priester,* 234 F. Supp. 799 (E. D. S. C. 1964) where the receiver of a default judgment debtor moved, under Rule 60 (b) (6), to vacate and set aside two default judgments rendered against the party in receivership on the grounds that said judgments are void and fraudulent insofar as the other creditors of the insolvent debtor are concerned. The Court set aside the judgments so that all creditors could share equally and the judgment creditors would not be permitted a preference. It is the position of the petitioners herein that a judgment *in personam* rendered against the bankrupt after the institution of bankruptcy proceedings, is binding on the Trustee only if the Trustee was made a party and directed by the Bankruptcy Court to defend the suit. *Rhodes* v. *Elliston*, 29 F. 2d 737 (5th Cir. 1928).

Even if the Trustee is made a party, but at too advanced a stage to afford an opportunity to inquire into the merits—as, for instance, after a judgment had been rendered by default—the Bankruptcy Court may refuse to be bound by the judgment and require the creditor to

file his proof on the facts underlying the judgment rather than on the judgment itself. 3A *Collier on Bankruptcy* 1835 (14th Ed. 1969).

It is thus petitioners' position that the respondent must not only file its claim against the petitioners in their respective bankruptcy proceedings but that the Trustee has a statutory duty to examine the proof of claim and object to any claim, such as respondent's, which is improper. *Bankruptcy Act* §47a (8) (11 U. S. C. 75a(8)), *James Talcott, Inc.* v. *Glavin,* 104 F. 2d 851 (3d Cir. 1939), *cert. den.* 308 U. S. 598.

Under these circumstances, the Trustee in Bankruptcy of George and Ernest Horvath may well succeed in defeating the Government's claim before the Referee, a court of competent jurisdiction. Should the Trustee so succeed, he would be placed in the conflicting position of utilizing the default judgment herein for the purposes of voiding an alleged "fraudulent conveyance" of property from Ernest Horvath to his wife on one hand and discrediting the legal basis for the very same judgment by opposing the Government's claim on the other.

POINT II

The District Court's denial of petitioners' motion under Rule 60(6)(1) was not only an abuse of discretion but also an improper punishment of petitioners for the excusable neglect, error or mistake of their attorneys.

The construction given to Rule 60 (b) (1) by the Courts below and their application of the facts herein to such Rule are so narrow and the effects are so inequitable as to constitute an abuse of discretion and an unwarranted punishment of and penalty against petitioners for the errors or negligence of their counsel.

Rule 60 (b) (1) permits the vacating of default in case of mistake or excusable neglect. The application herein is timely (within 40 days, well within the one-year permitted period).

In applying the Rule, the Courts give a liberal construction. Thus the Court in *Tozer* v. *Charles A. Krause Milling Co.*, 189 F. 2d 242, 245 (3d Cir. 1951) stated:

> "The recent cases applying Rule 60(b) have uniformly held that it must be given a liberal construction. Matters involving large sums should not be determined by default judgments if it can reasonably be avoided. Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits. Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments". (citations omitted)

"Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits." 7 *Moore's Federal Practice* 224 (2d Ed. 1970).

"The philosophy of modern federal procedure favors trials on the merits, and default judgments should generally be set aside where the moving party acts with reasonable promptness, alleges a meritorious defense to the action and where the default has not been willful." *Thorpe* v. *Thorpe*, 364 F. 2d 692, 694 (D. C. Cir. 1966). See *Tolson* v. *Hodge*, 411 F. 2d 123 (4th Cir. 1969); *Rooks* v. *American Brass Co.*, 263 F. 2d 166 (6th Cir. 1959); *Consolidated Gas & Equipment Co.* v. *Carver*, 257 F. 2d 111 (10th Cir. 1958).

Such liberality was accorded the Government when its case was dismissed for lack of prosecution. If the courts are liberal where the litigant is at fault, it follows *a fortiori* that at least as much should be granted where it is litigant's counsel—and not litigant—who is at fault.

Perhaps the case best illustrative of the court's attitude toward inadvertent mistakes of counsel and that most similar to the instant matter is *Patapoff v. Vollstedt's, Inc.*, 267 F. 2d 863 (9th Cir. 1959). An involuntary petition in bankruptcy was filed against the petitioner in the *Patapoff* matter. Petitioner's counsel erroneously advised petitioner to consent to be adjudicated a bankrupt and not to defend against the involuntary petition. The petitioner had a meritorious defense to the allegations in the involuntary petition. In its opinion the Circuit Court of Appeals specifically stated that "only after a careful study of all relevant considerations should Courts refuse to open default judgments." and the Court under Rule 60(b) vacated the adjudication in bankruptcy.

It is inherently unjust to impose upon defendants the excusable mistakes of their counsel. In *Minneapolis Brewing Co.* v. *Merritt*, 143 F. Supp. 146 (No. Dak. 1956), the ground upon which the Court set aside a default judgment against the defendant was excusable mistake and neglect in that the default occurred as a result of confusion in the offices of the attorneys for the defendant.

In the case at bar, as stated earlier, confusion, compounded by a number of mistakes of counsel, resulted in great detriment to the petitioners.

The rationale set forth in *Minneapolis Brewing Co.* v. *Merritt, supra* at 149 is quite apropos "But in the instant case the negligence of the defendants' attorneys may properly be regarded as excusable. Any doubts the Court

may have will fairly be resolved in favor of the motion inasmuch as defendants' answers present substantial issues which can be tried on the merits without unreasonable prejudice to the plaintiff. Having the element of mistake in addition to excusable neglect, there is good and sufficient cause for setting aside the default judgment and allowing the defendants' answers" (citation omitted).

The Courts will, and should, in a proper case, refuse to punish the client for the negligence of his attorneys especially where default judgments are involved.

Thus in *Barber* v. *Turberville*, 218 F. 2d 34 (D. C. Cir. 1954) the Court under Rule 60(b)(1) set aside a default judgment where the defendant's attorney negligently permitted a default judgment against her. The Court stated at 36:

> "That the defendant personally was not negligent in the protection of her interest seems clear from the facts recited. In situations such as are here disclosed, the Courts have been reluctant to attribute to the parties the errors of their legal representatives. See e.g. Elias v. Pitucci, D. C. E. D. Pa. 1952, 13 F. R. D. 13; Kantor Bros. v. Mutual Construction Co., D. C. E. D. Pa. 1943, 3 F. R. D. 227; Robins v. Pitcairn, D. C. N. D. Ill. 1940, 3 F. R. S. 60b.21 Case 2."

As examples of other cases applying the above stated rules see *La Barbera* v. *Grubard*, 112 F. 2d 738 (2d Cir. 1940); *Horn* v. *Intelectron Corp.*, 294 F. Supp. 1153 (S. D. N. Y. 1968); *Dyotherm Corp.* v. *Turbo Machine Co.*, 39 F. R. D. 370 (E. D. Pa. 1966).

Although the Courts below cite a certain number of cases as supporting respondent's position, these cases are fully distinguishable since in those cases either the party made

an informed, conscious choice and no default judgment was involved, or there was an inordinate delay in prosecuting an action. No such situation is present in the case at bar. Petitioners, in their briefs below, have discussed these cases at great length but believe that such a discussion is not appropriate to this petition for a writ of certiorari.

Special note must be made of the only Supreme Court case which is cited by the lower court. In *Link* v. *Wabash R. Co.*, 370 U. S. 626 (1962), the plaintiff sought to vacate an involuntary dismissal of his complaint on the grounds that said dismissal was made by the Court on its own motion and without notice to plaintiff. In denying the plaintiff's application, the Court pointed out in its opinion that plaintiff's correct remedy was found in Rule 60(b) of the Federal Rules of Civil Procedure and intimated that had the motion been brought pursuant to said Rule, it would have been considered and may have been granted. The Court stated, at 632:

> "In addition, the availability of a corrective remedy such as is provided by Federal Rule of Civil Procedure 60(b)—which authorizes the reopening of cases in which final orders have been inadvisedly entered—renders the lack of prior notice of less consequence. Petitioner never sought to avail itself of the *escape hatch* provided by Rule 60(b)" (emphasis added).

The Court further stated at 635:

> "Nor need we consider whether the District Court would have been abusing its discretion had it rejected a motion under Rule 60(b) which was accompanied by a more adequate explanation for the absence of petitioner's counsel from the pre-trial

conference. No such motion was ever made, so that there is nothing in the record before us to indicate that counsel's failure to attend the pre-trial conference was other than deliberate or the product of neglect."

Petitioners have properly moved herein pursuant to Rule 60(b) and there is before this Court a complete record and explanation of the mistake, inadvertence and excusable neglect because of which relief is sought.

Thus the petitioners have fully complied with the requirements set forth by the majority in the *Link* decision.

Respondent in its brief below refers to footnote 10 of the *Link* case (cited above) and another case as indicating that the petitioners may, as their remedy, have a suit against the attorneys for malpractice. The effect of such an argument, even assuming the collectibility of a judgment were it obtained, is to create, in addition to that of the trustee's anomalous position, an equally additional anomalous position for petitioners, where the validity of the Government's claim would again have to be twice litigated; once in the Bankruptcy Court when the Government seeks to assert its claim against the assets of the bankrupt, and again in the malpractice suit where, as a basis for establishing malpractice, the Court might require proof of the validity of the defenses and the invalidity of the Government's claim. All of the inequities referred to herein, the contradictions and anomalies, are the result of the simple denial of a fundamental right that has been customarily granted to a litigant, viz., his day in court. We think that this is an instance where petitioners' condition may be appropriately summarized by a quotation from Mr. Justice Black's dissent (at p. 649) in the *Link* case

(which, as with the majority opinion, supports the petitioners' position).

> "It may not be of much importance to anyone other than the plaintiff here and his family whether this case is tried on its merits or not. To my mind, however, it is of very great importance to everyone in this country that we do not establish the practice of throwing litigants out of court without notice to them solely because they are credulous enough to entrust their cases to lawyers whose names are accredited as worthy and capable by their government. I fear that this case is not likely to stand out in the future as the best example of American justice."

CONCLUSION

For the reasons set forth in this petition, this Court should grant certiorari.

Respectfully submitted,

MANES, STURIM, ROTH & FISHER,
Attorneys for Petitioners, Ernest V. Horvath and George A. Horvath,
250 Park Avenue,
New York, N. Y. 10017,
(212) 687-0900

DAVID FISHER,
PAUL A. DOUGLAS,
Of Counsel.

APPENDIX

District Court Opinion of Hon. Harold R. Tyler, Jr., Dated July 28, 1970

TYLER, D.J.

Motion pursuant to Rule 60(b)(1), F.R.Civ.P. by defendants Ernest V. Horvath and George A. Horvath and their attorneys, Ballon, Stoll & Itzler, Esqs., (hereinafter "the Ballon firm"), to vacate the judgment entered in this court against the defendants herein on April 28, 1970 in the amount of $3,035,090.71.

Notwithstanding the prolix motion papers and briefs of the parties on this motion, the following chronology of conceded facts is significant for purposes of resolution of this motion:

1. On January 6, 1970, this court called a pre-trial conference of this case, which was assigned to the undersigned as part of the ongoing experimental individual calendar program in this district. At that conference, court informed counsel that the case would be set down for trial on February 18, 1970 or as soon thereafter as the court could reach the case.

2. On February 17, 1970 defendants Ernest and George Horvath filed voluntary petitions in bankruptcy in this Court.

3. As a result of an informal alert from the court to counsel in late February that the judge would soon reach this case for trial, there ensued discussions between counsel respecting termination of the litigation by a consent judgment or default judgment without opposition. On March 3 and March 9, 1970, Assistant United States Attorney Toder wrote a letter to the court and to defendants' counsel, respectively, concerning these discussions.

4. On March 16, 1970, the United States filed before Referee Babitt of this court proofs of claim against the two Horvaths, which recited the claim in this case of the United States in the sum of $3,035,090.71. The proofs of claim described this case by name and number as above.

5. On April 14, 1970, Assistant United States Attorney Toder discussed with Mr. Kaufman of the Ballon firm the conclusion or wind-up of this case. In substance, it was the position of Mr. Kaufman that his office would not stipulate to a judgment against their clients but on the other hand neither his office nor their clients would oppose a default judgment entered by the government to dispose of this litigation.

6. Thereafter, on April 17, 1970, Assistant United States Attorney Toder mailed to the Ballon firm notice of settlement of a judgment to terminate this litigation. Thereafter, until this motion was filed, there was no objection to the proposed judgment.

7. As indicated heretofore, the judgment submitted by the United States, not having been opposed, was entered in this court on April 28, 1970.

8. On May 19 and May 25, 1970, in the bankruptcy part of this court, the government examined Mrs. Ernest Horvath pursuant to Section 21A of the Bankruptcy Act. The examination revealed evidence of a transfer of title to a cooperative apartment without consideration from Ernest Horvath to his wife in 1965 or 1966; her sale of this apartment in 1969 for an amount approximating $250,000; and Mrs. Horvath's purchase from the latter proceeds another apartment and various securities. This information was conveyed by government counsel to the trustee in bankruptcy.

9. On June 4, 1970, the trustee in bankruptcy brought on a motion by way of an order to show cause directing Mrs. Horvath to explain why she should not be obliged to turn over the proceeds of the aforesaid transfer from her husband as violative of Section 273(a) of the New York Debtor and Creditor Law. Upon the return day of that motion, June 9, 1970, the Ballon firm sought and obtained from Referee Babitt an adjournment of the hearing on the motion upon the ground that they were preparing the motion papers to be submitted before this court and which are now under discussion.

10. On June 12, 1970, the Ballon firm filed the instant motion with this court. Various adjournments were agreed to by the parties, and on July 17, 1970 the motion was argued before the undersigned.

The Horvaths and their counsel ostensibly make two specific claims of "mistake, inadvertence, ... or excusable neglect;" (1) that due to illness and certain changes in the lawyer personnel in the office of the Ballon firm, it never came to the attention of Itzler, the member of that firm handling the bankruptcy, that the judgment was entered or was about to be entered in this litigation, and (2) that a younger lawyer, Kaufman, mistakenly assumed that the filing of bankruptcy proceedings "automatically" stayed this suit. I have carefully read all of the affidavits in support of this motion and do not find any firm, persuasive evidence that there was an oversight and/or "mistake" as claimed, or, if there were, that such was a significant reason for the entry of judgment in this case on April 28, 1970. Rather, I infer from admissions contained in the affidavits of the moving parties that Mr. Itzler was well aware of the contemplated judgment and the later entry thereof in this suit. Moreover, the fore-

going chronology of conceded events and other matters in the record compel the finding that, far from being a "mistake", the decision not to oppose entry of the judgment in this case was a calculated one on the part of the Horvath defendants and their counsel. Quite evidently, when it became apparent that this court was about to reach this six year old case for trial, the voluntary petitions were filed and entry of the judgment was not opposed with the expectation that the judgment would be "washed out" in the bankruptcy proceedings. It was only when the Section 21A examinations developed information of a transfer of assets in possible violation of Section 273(a) of the New York Debtor and Creditor Law that Ernest Horvath and his counsel, understandably concerned about loss of substantial assets by Mrs. Horvath, raised contentions of "mistake" and "excusable neglect". With remarkable candor, they concede this in the following statement at page 2 of their main brief:

> "The Trustee in Bankruptcy of the bankrupt estate of Ernest Horvath has moved the Bankruptcy Court for an order directing Mr. Horvath's wife to turn over and surrender to the Trustee certain shares of stock and moneys, the major item being the shares of stock in the cooperative corporation which owns the apartment in which Ernest Horvath, his wife and her daughter now reside and make their home. Said motion is made pursuant to Section 273(a) of the Debtor and Creditor Law of the State of New York, which is more fully discussed herein. Suffice it to say at this point that, absent the default judgment herein entered, the statute upon which the Trustee is proceeding, would be inapplicable and have no force and effect. It is for this reason that your deponent moves this Court for the vacat-

ing of said judgment, a judgment which could never be entered after a full trial on the merits of this action." (Underscoring added.)

Having pursued an intelligible, purposeful course of conduct, which included the decision not to oppose entry of judgment here, movants cannot use the unhappy and unforeseen development of the trustee's application pursuant to Section 273(a) as a basis for a successful motion under Rule 60(b)(1). *Dal International Trading Company* v. *Sword Line, Inc.*, 286 F. 2d 523 (2d Cir. 1961); *Hoffman* v. *Celebrezze*, 405 F. 2d 833, at 837 (8th Cir. 1969). Even if it be accepted that ignorance of the law on the part of one or more lawyers in the Ballon firm was a principal reason for the decision not to oppose entry of judgment, this would be an insufficient ground for the relief here requested. *Link* v. *Wabash R. Co.*, 370 U. S. 628 (1962); *Ohliger* v. *United States*, 308 F. 2d 667, at 668 (2d Cir. 1962).

Finally, to the extent that movants purport to rely upon Rule 60(b)(6) as an alternative basis for relief, they are in error. It is settled that clause (6) is a residual provision, 7 Moore's Federal Practice (2d Ed.) §60.27(1), which purports to deal with matters other than those specifically covered in the first five clauses of Rule 60(b). Clearly, movants' arguments center under clause (1), and there is no factual or legal reason for consideration of clause (6).

In the exercise of discretion, the motion is denied. It is so ordered.

July 28, 1970.

H. R. TYLER, JR.
U. S. D. J.

Court of Appeals Opinion of Hon. J. Joseph Smith, Dated April 2, 1971

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 494—September Term, 1970.

(Argued February 17, 1971 — Decided April 2, 1971.)

Docket No. 35558

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

KLARI A. ERDOSS, Executrix of the Will of Akos Horvath, Deceased,

Defendant,

ERNEST V. HORVATH and GEORGE A. HORVATH,

Defendants-Appellants,

—v.—

MASMO, INC. (Formerly known as Massachusetts Mohair Plush Company, Inc.),

Defendant.

Before:

LUMBARD, *Chief Judge,*

SMITH and FEINBERG, *Circuit Judges.*

Appeal from denial of motion to vacate default judgment in the United States District Court for the Southern

District of New York, Harold R. Tyler, Jr., *Judge*. Affirmed.

DAVID FISHER, New York, N. Y. (Manes, Sturim, Roth & Fisher, New York, N. Y., Paul A. Douglas, New York, N. Y., of counsel), *for Appellants*.

RICHARD S. TODER, Assistant U. S. Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, David Paget, Assistant U. S. Attorney, of counsel), *for Appellee*.

SMITH, *Circuit Judge*:

Defendants appeal from a decision of the United States District Court for the Southern District of New York (Harold R. Tyler, Jr., *Judge*), denying their motion pursuant to Rule 60(b), Federal Rules of Civil Procedure, to vacate the default judgment entered against them for over $3 million. Rule 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . (6) or any other reason justifying relief from the operation of the judgment.

Defendants argue that Judge Tyler's refusal to grant their motion constitutes an abuse of the discretion which is provided the trial judge by the terms of the Rule. We find no abuse of discretion, and affirm the denial of defendant's motion.

The suit which gave rise to the judgment in question was an action brought by the United States as a judgment creditor of a now defunct corporation known as Horvath Mills, Inc., against the defendants to recover an amount alleged under New York law to have been improperly transferred by the corporation to them. In 1958, the United States obtained a judgment against Horvath Mills. Since Horvath Mills was found to be insolvent, the present action against the Horvaths and Masmo, Inc. was filed in January, 1964 after the government discovered the transferral of assets. In January, 1970, the district judge called a pretrial conference and informed counsel that trial would commence on or about Febraury 18, 1970. On February 17, 1970, defendants Ernest and George Horvath filed voluntary petitions in bankruptcy in the district court. Discussions between counsel concerning termination of the litigation by either a consent or default judgment followed. On March 16, 1970, the government filed before the Referee in Bankruptcy proofs of claim against the two Horvath defendants, reciting the claim in the sum of more than $3 million.

In April, 1970, Assistant United States Attorney Toder discussed with a member of the law firm representing the Horvaths the conclusion of the case. Judge Tyler found that the defense attorney informed the government that although defense counsel would not stipulate to a judgment, they would not oppose the entry of a default judgment. Defendants dispute the accuracy of this finding, but it is apparently not disputed that the Assistant United States Attorney mailed to counsel notice of settlement of a judgment to terminate the litigation, and until filing of the motion in issue here, no objection to the proposed judgment was filed. Default judgment was entered on April 28, 1970.

Court of Appeals Opinion of Hon. J. Joseph Smith

In May, 1970, the government examined Mrs. Ernest Horvath in the bankruptcy proceedings in the district court. At this time it was learned that in 1965 and 1966, Ernest Horvath had transferred to his wife title to their cooperative apartment, and that she had later sold this apartment and used the proceeds to purchase another apartment and various securities. New York Debtor and Creditor Law §273-a provides that a conveyance made without fair consideration at a time when the transferor is a defendant in an action is fraudulent as to the plaintiff in that action without regard to actual intent if the transferor-defendant fails to satisfy the judgment once it has been entered. Thus it is likely that the trustee in bankruptcy will succeed in voiding the transfer to Mrs. Horvath, making those assets subject to the default judgment.

The motion seeking relief from the judgment under Rule 60(b) was filed on June 12, 1970. Defendants argue that due to illness and certain changes in the law firm handling defendants' case, neither proposed entry of the judgment nor its actual entry came to the attention of the member of the firm handling the bankruptcy. It was further contended that a younger lawyer mistakenly assumed that the filing of bankruptcy proceedings automatically stayed the suit. Judge Tyler found, however, that "[the senior member] was well aware of the contemplated judgment and the later entry thereof in this suit." Despite defendants' protestations to the contrary, we conclude that this finding is adequately supported in the record. Although in his affidavit the senior member states that at the time he prepared the bankruptcy schedules (February 1-17) he was not aware of the litigation, at no time does he deny knowledge of the action as of March or April, 1970, the crucial period in this case, since it was during that time

that the acquiescence of defense counsel in the proposed and ultimately entered default judgment took place.

Once it is accepted that the senior member knew that entry of the judgment was imminent, the contention that judgment was unopposed solely because a younger lawyer thought the action was automatically stayed becomes highly suspect. It thus follows, as Judge Tyler concluded, that in deciding not to oppose entry of judgment defendants "pursued an intelligible, purposeful course of conduct." In other words, since defense counsel was apparently unaware of the effect of New York Debtor and Creditor Law §273-a, they purposefully agreed to accept entry of judgment.

The law in this circuit is reasonably clear when a conscious decision has been made by counsel, ignorance of the law "is not the sort of 'excusable neglect' contemplated by Federal Civil Rule 60(b), 28 U.S.C.A. as ground for vacating an adverse judgment." *Ohliger* v. *United States,* 308 F.2d 667 (2d Cir. 1962) (per curiam). In *Dal International Trading Co.* v. *Sword Line, Inc.,* 286 F.2d 523 (2d Cir. 1961), a creditor entered into a stipulation expunging its claim in an arrangement proceeding, believing that it was legally able to enforce its claim in admiralty. As the facts developed, it became apparent that such a belief was mistaken, and the creditor sought to reopen the judgment on the basis of Rule 60(b). Judge Kaufman, the district judge, refused, and this court affirmed. "[G]enerally a party who makes an informed choice will not be relieved of the consequences when it subsequently develops that the choice was unfortunate." 286 F.2d at 525. This ruling is applicable to the present case. See also, *Benton* v. *Vinson Elkins, Weems & Searls,* 255 F.2d 299 (2d Cir.) (per curiam), *cert. denied,* 358 U.S. 885 (1958).

Defendants' argument that Judge Tyler abused his discretion in failing to grant relief under Rule 60(b)(6) is also without merit. Although the view of this circuit is not universally held, see *Patapoff* v. *Vollstedt's, Inc.*, 267 F.2d 863 (9 Cir. 1959), it is our belief that Rule 60(b)(1) and 60(b)(6) are mutually exclusive, so that any conduct which generally falls under the former cannot stand as a ground for relief under the latter. See *Rinieri* v. *News Syndicate Co.*, 385 F.2d 818, 822 (2d Cir. 1967); 7 Moore's Federal Practice ¶60.27[1] (2d ed. 1970). Since the alleged grounds for relief under Rule 60(b) here concerned mistake, only Rule 60(b)(1) is applicable.

The decision denying vacation of the default judgment is affirmed.

Order of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of April one thousand nine hundred and seventy-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

KLARI A. ERDOSS, Executrix of the Will of Akos Horvath, Deceased,

Defendant,

ERNEST V. HORVATH and GEORGE A. HORVATH,

Defendants-Appellants,

—v.—

MASMD, INC. (Formerly known as Massachusetts Mohair Plush Company, Inc.),

Defendant.

Appeal from the United States District Court for the Southern District of New York.

Order of Affirmance

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that, the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

STATUTES

Stock Corporation Law of New York §15

"No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except as to any rights or interests which may be acquired thereunder by any person without notice or reasonable cause to believe that such conveyance, assignment, transfer, payment, judgment, lien or security would effect a preference, and except also that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. No corporation formed under or subject to the banking, insurance or railroad law shall make any assignment in contemplation of insolvency. Every person receiving by means of any such prohibited act or deed any property of a corporation shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the foregoing provi-

sions of this section shall be void, except as hereinbefore provided. Every director or officer of a corporation who shall be concerned in the making of any conveyance, assignment, transfer or payment, the suffering of any judgment or the creation of any lien or the giving of any security by such corporation when it is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over any of the other creditors of the corporation, or who shall violate or be concerned in violating any other provision of this section shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation."

Section 273-a of the Debtor and Creditor Law of New York

"Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant, if, after final judgment for the plaintiff, the defendants fails to satisfy the judgment."

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-2

ERNEST V. HORVATH and GEORGE A. HORVATH,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY IN SUPPORT OF PETITION

MANES, STURIM, ROTH & FISHER,
Attorneys for Petitioners,
Ernest V. Horvath and
George A. Horvath,
250 Park Avenue,
New York, N. Y. 10017.

DAVID FISHER,
PAUL A. DOUGLAS,
Of Counsel.

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Robins v. Pitcairn, 3 F. R. S. 601 (N. D. Ill. 1940)	2
Transit Casualty Co. v. Security Trust Company, 441 F. 2d 788 (5th Cir. 1971)	2
United States v. Williams, 109 F. 2d 198 (D. C. Cir. 1965)	2

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Federal Rules of Civil Procedure:

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Authorities Cited

Equitable Power of a Federal Court to Vacate a Final Judgment for "Any Other Reason Justifying Relief", 33 Mo. L. Rev. 427, 437-439 (1968) 1fn, 2fn

Wham, Federal District Court Rule 60(b): A Humane Rule Gone Wrong, 49 A. B. A. Journal 566 (1963) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-2

ERNEST V. HORVATH and GEORGE A. HORVATH,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY IN SUPPORT OF PETITION

The United States in its Memorandum in Opposition completely ignores the fact that the courts below failed to consider Rule 60(b)(6) of the Federal Rules of Civil Procedure. This failure is significant as the Second Circuit expressly recognized that its view was contrary to that of the Ninth Circuit in *Patapoff* v. *Vollstedt's, Inc.*, 267 F. 2d 863 (9th Cir. 1959). It has been stated that there has been a "confusion of opinion and muddled application" of Rule 60(b)(1) and 60(b)(6) by the lower Federal courts and that this "manifest confusion" stems from the plethora of opinions issued by this court in *Klapprott* v. *United States*, 335 U. S. 601 (1949) and *Ackermann* v. *United States*, 340 U. S. 193 (1950).[1]

[1] Comment, *Equitable Power of a Federal Court to Vacate a Final Judgment for "Any Other Reason Justifying Relief"—Rule 60(b)(6)*, 33 Mo. L. Rev. 427, 437-439 (1968).

The proper interpretation of Rule 60(b)(6) is the subject of current controversy as made manifest by the Fifth Circuit case of *Transit Casualty Co.* v. *Security Trust Company*, 441 F. 2d 788 (5th Cir. 1971). In that case the plaintiffs' lawsuit involving in excess of one million dollars was dismissed without having once been brought to court on the merits and there is now pending a Petition for Writ of Certiorari before this Court under number 71-228, August 13, 1971.

The writer of the Missouri Law Review article referred to earlier, although taking a more restricted approach than we believe justified, recognized that "courts have allowed some parties limited relief under Rule 60b(6) when the conduct of their attorney is grossly improper, and the party himself ought not in all equity suffer for it."[2] and cited cases therefor.[3] Attention is also respectfully directed to the cases of *Griffin* v. *Kennedy*, 344 F. 2d 198 (D. C. Cir. 1965); *United States* v. *Williams*, 109 F. Supp. 456 (W. D. Ark. 1952); and *Robins* v. *Pitcairn*, 3 F. R. S. 601 (N. D. Ill. 1940).

The court's denial of petitioners' motion under Rule 60(b)(1) was not only an abuse of discretion but also an improper punishment of petitioners for excusable neglect, error or mistake of their attorneys. To permit a default judgment to stand without a trial on the merits is even more unjust when the United States government is the party taking the judgment. Thus, as stated in *Fleming* v. *Huebsch Laundry Corp.*, 159 F. 2d 581, 584 (7th Cir. 1947): "We are dealing with a citizen and his government. The

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[2] 33 Mo. L. Rev. 440 (1968).

[3] *Hutton* v. *Fisher*, 359 F. 2d 913 (3rd Cir. 1966); *Barber* v. *Turberville*, 218 F. 2d 34 (D. C. Cir. 1954); *Dyotherm Corp.* v. *Turbo Machine Co.*, 39 F. R. D. 370 (E. D. Pa. 1966); *Minneapolis Brewing Co.* v. *Merritt*, 143 F. Supp. 146 (No. Dak. 1956).

latter should not demand money unless the citizen owes it. Moreover, if it erred in its demand it should be eager to undo the mistake. Good or loyal citizenry is not bred or developed by such conduct.''

This Court should not permit Rule 60(b) to be construed so strictly so as to exalt form over substance and to defeat the liberal application for which Rule 60(b) was designed.[4]

Respectfully submitted,

MANES, STURIM, ROTH & FISHER,
Attorneys for Petitioners Ernest V. Horvath and George A. Horvath,
250 Park Avenue,
New York, N. Y. 10017.

DAVID FISHER,
PAUL A. DOUGLAS,
Of Counsel.

[4] See Wham, *Federal District Court Rule 60(b): A Humane Rule Gone Wrong*, 49 A. B. A. Journal 566 (1963).

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-2

ERNEST V. HORVATH and GEORGE A. HORVATH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1958, the United States obtained judgment against Horvath Mills, Inc., for $1.7 million representing overpayments made by the United States to that corporation on various Korean-wartime contracts for the manufacture of tarpaulin. Subsequently, it discovered that Horvath Mills was insolvent as a result of the transfer of assets by that corporation, made at the direction of its officers and directors (the petitioners), to Masmo, Inc., and the petitioners.

In 1964, the United States brought suit in the district court as a judgment creditor of Horvath Mills, alleging that petitioners had improperly transferred the corporate assets of Horvath Mills in violation of New York law, and that petitioners therefore were liable to satisfy the government's judgment against Horvath Mills. Before trial, petitioners filed voluntary petitions in bankruptcy. The United States then obtained a default judgment against petitioners.

On June 12, 1970, more than forty days after judgment, petitioners moved in the district court pursuant to Rule 60(b), F.R.Civ.P., to set aside the default judgment on the ground of mistake and inadvertence or excusable neglect by their former counsel. The district court denied the motion (Pet. App. A1-A5), finding that "* * * the voluntary petitions were filed and the entry of judgment was not opposed with the expectation that the judgment would be 'washed out' in the bankruptcy proceedings * * *" (Pet. App. A4) and that petitioners' former counsel had "* * * pursued an intelligible, purposeful course of conduct * * *" (Pet. App. A5). The court of appeals affirmed (Pet. App. A6-A11).

The correctness of the narrow factual holding that, in the particular circumstances of this case, there had not been a sufficient showing to justify the reopening of the default judgment, does not warrant further review. The decision whether to reopen a default judgment lies within the discretion of the district court and, as the court of appeals correctly held (Pet. App. A7), there was no abuse of discretion here.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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